No. 97-8214

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IN THE SUPREME COURT OF THE UNITED STATES
October 1997 Term

ANGEL FRANCISCO BREARD

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

CAPITAL CASE
EXECUTION DATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
April 14, 1998

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether, under the United States Constitution's Supremacy Clause, Article 36(2) of the Vienna Convention on Consular Relations precludes the application of the bar of procedural default to claims brought pursuant to the consular notification provisions of Article 36(1) in a petition for a writ of habeas corpus.

2. Whether, at the time of Petitioner's direct appeal and state habeas proceedings, the applicability of the consular notification provision was "novel" so as to constitute cause for the procedural default of claims based upon a violation of that provision.

3. Whether Virginia's mandatory proportionality review was conducted by the Virginia Supreme Court in a manner so inherently defective that it violated Petitioner's state created life and liberty interests and denied him due process.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, No. 96-25, 1998 WL 19920 (Feb. 18, 1998), App. 1-12, is not yet reported. The opinion of the United States District Court, App. 13-36, is reported at 949 F. Supp. 1255 (E.D. Va. 1996).

JURISDICTION

The Court of Appeals entered judgment on January 22, 1998, and denied rehearing on February 18, 1998. App. 80. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

LAW INVOLVED

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 provides, in relevant part:

Article 36

Communication and contact with nationals of the sending state

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

(a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state;

(b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

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2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

Virginia's proportionality review statute, Virginia Code § 17-110.1, provides in relevant part:

§ 17-110.1. Review of death sentence. -- A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

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C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

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2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

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E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive.

STATEMENT OF THE CASE

Introduction

Angel Francisco Breard, petitioner, is a Paraguayan citizen currently on Death Row in Virginia's Mecklenburg Correctional Center. He seeks federal habeas corpus relief. The authorities of the Commonwealth of Virginia have stipulated that Mr. Breard was not advised of his rights to consular notification and access under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention" or the "Convention" or the "treaty") prior to being tried and sentenced to death in Arlington County, Virginia in 1993. App. 180-81. The treaty explicitly required that he be so advised. As a treaty, entered into by the President of the United States with the advice and consent of the Senate, the Convention is the "supreme law of the land." U.S. Const. art. VI, cl.2. The Republic of Paraguay brought suit seeking redress of its own rights under the Convention in connection with the proceedings against Mr. Breard, and its Petition for a Writ of Certiorari has been filed with this Court.[1]

Mr. Breard did not contest the violation of his rights under the treaty at trial, on direct appeal, or in his state habeas corpus petition because neither he nor his counsel knew of the Convention. In federal habeas proceedings, he asserted that he was convicted and sentenced in violation of Article

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[1] *See* Republic of Paraguay v. Gilmore, No. 97-1390, *petition for cert. filed*, Feb. 24, 1998.

36(1) of the Convention, but the federal courts held that the claim had been defaulted.[2] This petition raises two issues regarding the purported default of his claim.

First, the language of the treaty expressly exempts claims under Article 36(1) from the judicially created doctrine of procedural default. Second, if claimed violations of Article 36(1) are capable of being procedurally defaulted, the utter unfamiliarity of the American criminal defense bar and habeas corpus counsel with the Convention establishes cause to excuse such procedural default. Mr. Breard clearly can establish prejudice because he would have accepted the state's proffered plea bargain if he had received instruction from his own consular authorities on the American legal system and the culture which produced it, and how they differed from those of southern Latin America where he had been raised.

It appears that violating the requirements of Article 36 of the Vienna Convention is the norm, not only in Virginia[3], but throughout the United States.[4] In fact, various high state officials have publicly questioned the applicability and the binding effect of the Convention with respect to the criminal law enforcement activities of the states. Frank Green, a reporter for the Richmond Times-Dispatch, wrote an article in the September 17, 1997 edition concerning the murder conviction of

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[2]Virginia law provides no mechanism for a petitioner under a sentence of death to exhaust a claim by bringing a second petition. Under Va. Code § 8.01-654.1, "[n]o petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after" this Court's denial of certiorari on direct appeal.

[3]Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court."), *aff'd sub nom.* Breard v. Pruett, __F.3d__, No. 96-25 at 10 (4th Cir. Jan. 22, 1998); Murphy v. Netherland, CA No. 3:95CV856, slip op. at 6-8 (E.D. Va. July 26, 1996)("The Court does not condone what appears to be Virginia's defiant and continuing disregard for the Vienna Convention."), App. 43-45, *aff'd*, 116 F.3d 97 (4th Cir.), *cert. denied*, 118 S. Ct. 26 (1997).

[4]*See, e.g.*, United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997) (Arizona); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996) (Texas).

Mexican Mario Murphy, that Virginia's former Governor, George F. Allen, "disputed whether it was Virginia's responsibility to notify Murphy a foreigner on death row of his Vienna Convention right." App. 293-95. *See* n. 13, *infra*. In that same case, the state prosecutor who oversaw the legal proceedings against Murphy was reported by The Virginian-Pilot & Ledger Star of Norfolk to have described an assertion of rights under Article 36 as "completely ridiculous" and to question whether such rights were enforceable: "I mean, what is the remedy? I suppose Mexico could declare war on us." App. 296-98. The General Counsel to Texas Governor George W. Bush reportedly protested a request by the U.S. Department of State for information concerning possible violations of Article 36 by Texas law enforcement officials on the ground that "the State of Texas is not a signatory to the Vienna Convention." Al Kamen, Virtually Blushing, The Washington Post, June 23, 1997, at A17. App. 299-301. The Executive Director of the Association of Retired Police Chiefs in Washington, D.C. is reported to have stated about foreigners' Vienna Convention rights that "[i]n my 47 years in law enforcement, I have never seen anything from the State Department or FBI about this." Margaret A. Jacobs, Some Convictions of Foreigners in U.S. Stir Debate Over Rights, The Wall Street Journal, Nov. 4, 1997, at B5. App. 302-03.

Mr. Breard is one of approximately 60 foreign nationals on America's death rows who apparently were convicted and sentenced to death in violation of the Convention. The effect of the states' blatant disregard of obligations imposed on them by treaty raises important issues of federal law never addressed by this Court. Only this Court has the authority to determine and interpret international law for all courts in the United States. Restatement (3rd) of the Foreign Relations Law of the United States § 112(2). The Supreme Court has an obligation to ensure that states comply

with federal law, particularly when the rights of foreigners and foreign nations are involved. The Federalist, No. 80 (Alexander Hamilton)(Masters, Smith & Co. ed. 1852).

The Vienna Convention is of great significance, not only to foreign nationals detained in the United States, but also to United States citizens traveling abroad who depend on the observance of their rights under the Convention by other nations.[5] The treaty functions as a "cultural bridge" and bestows on foreign nationals rights comparable to those accorded all persons pursuant to this Court's opinions in Gideon v. Wainwright, 372 U.S. 335 (1963), and Miranda v. Arizona, 384 U.S. 436 (1966). Indeed, our State Department, speaking on behalf of American citizens, has described one of the rights provided by Article 36 of the Vienna Convention as follows:

> . . . the host government *must notify the arrestee without delay of the arrestee's right* to communicate with the American consul.
>
> ***
>
> [This] provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government . . . *at a time when such information is most useful*.

United States Department of State, 7 Foreign Affairs Manual ¶¶ 411.1, 412 ("Chapter 400") (emphasis added). App. 280-81.

This case presents the Court with an opportunity to settle a conflict between compliance with treaty obligations and the judicially created doctrine of procedural default. In the courts below, the latter has been allowed to override the former and thereby cause those courts to sanctify admittedly

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[5]Figures available from the International Trade Administration, Tourism Industries, show over 50 million trips abroad annually by United States residents in recent years. *See* Abstract of International Travel, Tourism Industries, International trade Administration, http://tinet.ita.doc.gov/abst_ at 5-7. App. 285-92.

outrageous treaty violations by the states. To make matters worse, Paraguay's action[6] brought to vindicate its rights in the Breard matter has been dismissed below on Eleventh Amendment grounds. Hence, the grand sounding rights extended to foreign states and their citizens, as well as the solemn duties imposed upon each of the United States, have proven to be illusory. If it is the law of the United States that treaty rights and duties are subordinate to domestic judge-made law, then this Court should say so. If the converse is true, this Court, in exercising its constitutional role in foreign affairs, should enforce the treaty.

This Court should also review Mr. Breard's case because his death sentence was the product of Virginia's fundamentally flawed capital punishment system. Virginia, like many states in the aftermath of Gregg v. Georgia, 428 U.S. 153 (1976), adopted statutory procedures for capital punishment like those upheld in Gregg. One of the procedures mandated by state law is a proportionality review of the sentence by the Virginia Supreme Court. This vests in those sentenced to death a state-created life and liberty interest protected by the Constitution.

While the Virginia Supreme Court is required in every case to compare the death sentence under review with the sentences imposed in similar cases throughout the state, that court, in fact, compares any given case only to the cases *previously reviewed on appeal by that court*. The effect of Virginia's arbitrary mechanism is dramatically illustrated by Mr. Breard's case. The majority of capital cases similar to Mr. Breard's during the period 1985-1995 *resulted in a sentence less than death*; however, only a small portion of those cases were included in the Virginia Supreme Court's

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[6]*See* Republic of Paraguay v. Allen, __F.3d__, No. 96-2770, 1998 WL 19933 (4th Cir. Jan. 22, 1998), *petition for cert. filed sub nom.* Republic of Paraguay v. Gilmore, (U.S. Feb. 24, 1998)(No. 97-1390); United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997), *petition for cert. filed*, (U.S. Feb. 18, 1998)(No. 97-1365).

review *because most had not been appealed to that court*.[7] The same systemic error may infect the proportionality review of every death case. The review of a skewed pool of cases effectively denies capital defendants the statutorily mandated review of "similar cases" and deprives them of their life and liberty interests without due process of law.

This case presents this Court with the opportunity to settle an important question of federal law concerning the extent to which courts must honor state-created life and liberty interests in appellate procedures in death penalty cases.

Statement of Facts

A. Breard, His Crime and Trial

Angel Francisco Breard was born in Argentina, his father's native land, in 1966. In 1978 his family moved to his mother's family's home in Paraguay, and Mr. Breard later adopted Paraguayan citizenship. In 1986, at the age of 20, he came to the United States. App. 112, ¶ 23. He married in 1987, but the marriage lasted less than six months. App. 110, ¶ 17. In 1992, depressed and drunk, Mr. Breard committed a murder in the course of an attempted rape.

Mr. Breard was arrested on September 1, 1992 and charged with capital murder and attempted rape. App. 107, ¶ 4. Virginia has stipulated that he was not, at the time of his arrest or at any time thereafter, informed by Virginia or local authorities of his right pursuant to Article 36 of the Vienna Convention to contact the Paraguayan and/or the Argentine consulates for assistance

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[7] All convictions resulting in a death sentence are automatically appealed to the Virginia Supreme Court. Convictions resulting in life or a term of years can be appealed only to the intermediate-level appellate court. If the intermediate court affirms the life sentence, the defendant can petition for appeal to the Virginia Supreme Court. Va. Code Ann. §§ 17-110.1(A); 17-116.05:1(A)(I); 17-116.08.

in his defense. App. 180-81. He did not become aware of that right until his direct appeal and state habeas corpus proceedings had been concluded.

Prior to trial, the Commonwealth "made it clear to [Breard's attorneys] that the Commonwealth would forego the death penalty if Mr. Breard would plead guilty." Affidavit of trial counsel, App. 195, ¶ 5.[8] Trial counsel had "investigated the Commonwealth's evidence against Mr. Breard and satisfied [themselves] that the prosecution would be able to prove Breard's guilt beyond a reasonable doubt." Id., App. 194-95, ¶ 4. Nevertheless, against the advice of his counsel, Mr. Breard refused the offer of a life sentence and pled not guilty. Unfamiliar with the law and culture of the United States, he had decided instead "to testify and admit his guilt" to the jury in the hope that the jury would set him free upon learning that a satanic curse, now lifted, had been responsible for the crime. Id., App. 199, ¶ 16, and attached memorandum, App. 202.01-.02.

The Commonwealth's case against Mr. Breard was based entirely on DNA. The prosecution introduced no incriminating statements. After the prosecution rested, Mr. Breard took the stand in order to confess his crime to the jury. He testified that a satanic curse had been placed upon him by his former father-in-law, that the curse had caused him to commit the murder, and that the curse had been lifted upon his finding Jesus Christ after his arrest.

On direct examination, he described the curse and his release from it as follows:

> A. What I was going through is full of thought that came to my mind and keep coming to my mind and more than that, that I know now, is that everything is a spiritual thing, it's -- it's a warfare, it's a bitter warfare, it's something that you can't see, you can't touch it, but it's there. You feel it and it's powerful.

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[8]This affidavit was procured by the Commonwealth and introduced by it against Breard in his state habeas proceeding.

Q. What was causing these thoughts to your --

A. Was causing?

Q. Yes.

A. Well, I believe deeply everything was causing all that, it is Satanic practice against myself.

Q. And who initiated this Satanic practice against you?

A. My father-in-law.

***

All I was doing is seeking for myself, destruction for myself. In doing so I kill someone else.

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Q. [N]ow, is this curse still affecting you?

A. No.

Q. Why not?

A. It was very simple, because now I found Jesus, I just have him in my heart and my life, so now I'm free of all that. And in a way there is many things that I learned, and I learned speaking to him here in jail. And one thing that he said, if you keep my commandments you shall know the truth, and the truth shall make you free. If you keep my commandments you'll be truly my disciple.

So that does not affect me any more.

Q. Is there anything also about what happened that night that you want this jury to know?

A. Well, one important thing is that I never ever thought -- intend to kill her or to kill anyone. No, I did it as the fact. I did it, but I -- no, that's the best way I can explain to you. How it happened. I didn't want to do it, but it happened.

App. 215-22.

The Arlington County jury, predictably, did not set him free. He was convicted on all charges. After finding Mr. Breard guilty, the jury heard evidence pertinent to sentencing.

The jury deliberated for approximately 6½ hours on the question of penalty. During its deliberations, the jury twice sent out notes to the judge asking questions that showed its struggle with the decision between life imprisonment and death. The first question was, "with life in prison how long will he be there before he is eligible for parole?" App. 228. The trial judge instructed the jury that he could not answer the question and the jury should not concern itself with the possibility of parole. In colloquy with trial counsel, the Court observed, "it seems bizarre that we as a Commonwealth entrust jurors with a decision like this and won't tell them the reality of what their choices are." Id.

The second question was whether the jury can "recommend the sentence of life without the possibility of parole." Id., App. 229. In response, the Court instructed the jury that it must limit itself to the three choices previously outlined in the instructions: death, life imprisonment, or life imprisonment plus a fine. Ultimately, the jury fixed the sentence at death, and, on August 20, 1993, the trial judge held a sentencing hearing and imposed the death sentence. App. 232-35.

In sum, throughout the trial proceedings, due to his lack of understanding, Mr. Breard forced his American court-appointed attorneys to take a number of steps, against their advice, which were contrary to his best interest. For example:

> (a) Mr. Breard refused the proffered plea agreement in which the Commonwealth would seek only a life sentence if he would plead guilty, id., App. 195, ¶ 5;

(b) Mr. Breard insisted upon testifying on his own behalf, confessing his guilt, and explaining the events of February 17, 1992 as the only eyewitness to them, id.;

(c) Mr. Breard urged his attorneys not to call mitigation witnesses. They refused his directive on that occasion, id., App. 197, ¶ 9;

(d) Mr. Breard refused to permit his family members to be called as witnesses at the post-trial hearing on a motion to set aside the death penalty, id.;

(e) Mr. Breard refused to permit his attorneys to renew a pretrial motion to declare unconstitutional Virginia's method at that time of carrying out the death sentence, id.[9]

Never during the entirety of the proceedings against him was Mr. Breard informed of his right to contact the consulates of Paraguay and Argentina. Nor were those consulates informed of the detention and trial of their citizen or the imposition of the death sentence upon him, despite the Commonwealth's knowledge that Mr. Breard was a foreigner. App. 180-81. Since becoming aware of his plight (from sources other than American federal or state authorities), both Paraguay and Argentina have made every effort to assist Mr. Breard and have made clear that they would have done so sooner had they known of his arrest, detention and trial. Both nations have filed affidavits in this case describing the assistance they would have provided to Mr. Breard. App. 182-89; 190-93. Paraguay has also filed a separate lawsuit in an effort to vindicate its own Vienna Convention rights.[10]

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[9]A similar motion had been made in a Loudoun County, Virginia, case, supported by extensive expert evidence, and the prosecution dropped the capital murder charge there to moot that motion. App. 130-31 , ¶¶ 72, 73. In Mr. Breard's case, a similar pre-trial effort was made, but the trial judge ruled that the motion was premature and denied it with leave to renew it if Breard were convicted and given the death penalty. Preliminary Hearing, App. 205-14.

[10]*See* Paraguay's Petition for a Writ of Certiorari in this Court, Republic of Paraguay v. Gilmore, Docket No. 97-1390, *petition for cert. filed Feb. 23, 1998.*

B. The Rights to Consular Notification and Access Provided by the Vienna Convention Are of International Importance

When a foreign national of a signatory nation to the Vienna Convention on Consular Relations is arrested in another signatory nation, the Convention requires the latter to notify the arrested person of his right to contact his consulate. Article 36 of the Vienna Convention provides, in pertinent part:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
>
> (a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communications with and access to consular officers of the sending state;
>
> (b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;*
>
> ***
>
> 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said *laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.*

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 590 U.N.T.S. 261 (emphasis added).

The Convention was ratified with the advice and consent of the United States Senate in 1969, and is, thus, one of the laws of the United States. Statements of the United States Department of State repeatedly emphasize that Article 36 confers on the arrested or detained person the right to be informed of his right to consular notification. *See* Memorial of the United States to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran filed in response to the 1979 storming of the American Embassy ("Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others").

To reinforce the Convention's obligations, the United States State Department regularly sends notices to governors, state attorneys general, and mayors of cities having a population in excess of 100,000 advising them of their duties under the Vienna Convention and the importance of complying with its terms. App. 236-37. In August 1991 and October 1992, the State Department sent such notices to Virginia's Governor and Attorney General. App. 238-73.

The State Department also instructs United States consulates in other nations that the Vienna Convention requires that "the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul." Chapter 400, ¶ 411.1, App. 280. According to the State Department, immediate access allows the consular official to act as a "cultural bridge" between the arrested person and the arresting state at the time of the arrestee's greatest need to understand his rights under the foreign government's system of laws, the legal and judicial procedures facing him, and the local cultural norms. *See* id. App. 280-81, ¶¶ 401, 412. The State Department notes that "no one needs that cultural bridge more than the [individual] . . . who has been arrested in a foreign country. . . ." Id.

Moreover, as Judge Butzner wrote in his concurring opinion in the Court of Appeals:

> The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered around the world -- as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity . . . ." Hilton v. Guyot, 159 U.S. 113, 228 (1895).
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> ***
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> . . . The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

Breard v. Pruett, __F.3d__, No. 96-25, slip op. at 11-12 (4th Cir. Jan. 22, 1998). App. 11-12.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted to Determine Whether an Explicit Provision of International Law, Which Has Become the Supreme Law of the United States, Takes Precedence Over a Judicially Created Doctrine that Ordinarily Applies to Domestic Litigation

Under settled principles, the judicially created doctrine of procedural default in habeas corpus must be construed and applied in such a manner as to permit full effect to be given to the will of the political branches of the federal government clearly expressed in a treaty of the United States. *See, e.g.*, Hartford Fire Ins. Co. v. Merrett Underwriting Agency Management Ltd., 509 U.S. 764, 814-15 (1993) (domestic law must be construed so as to be consistent with the United States' international law obligations unless no other construction is possible). These principles apply with particular force to the procedural default doctrine because that doctrine is founded on federal deference toward

the state's traditional regulation of criminal proceedings. *See*, Trest v. Cain, __U.S.__, 118 S. Ct. 478 (1997) (procedural default is not jurisdictional, but is an affirmative defense grounded in concerns of comity and federalism). State concerns are entitled to no deference when they conflict with a treaty, as to which the federal government's control is exclusive. *See, e.g.*, Kolovrat v. Oregon, 366 U.S. 187, 198 (1961) (treaty overrides state laws regulating the descent and distribution of estates); United States v. Pink, 315 U.S. 203, 231 (1942) ("the power of a State to refuse enforcement of rights [based on State policy considerations] . . . must give way before the superior Federal policy evidenced by a treaty or International compact or agreement"); Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) ("[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land"); Missouri v. Holland, 252 U.S. 416, 433-35 (1920) (treaty and federal statute protecting migratory birds override state's power to act in that area); Restatement (3rd) of the Foreign Relations Law of the United States § 115 cmt e.

In agreeing to the Vienna Convention, the United States approved language that expressly exempts Article 36 rights from the operation of any country's laws that would prevent full effect from being given to the purposes for which Article 36 exists. [11] The United States entered no reservation with respect to that language. *Cf.* Restatement (3rd) of the Foreign Relations Law of the United States§ 314 (describing ability of nations to enter reservations with respect to treaty provisions). Paragraph 2 of Article 36 provides:

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[11]The Convention is self-executing. Breard v. Pruett, __F.3d__, No. 96-25, slip op. at 11 (Butzner, J. concurring), App. 11.; Faulder v. Johnson, 81 F.3d 515, 520 (5th Cir. 1996); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979); Sen. Exec. Rep. No. 9, 91st Cong., 1st Sess., App. at 5 (1969) (statement of U.S. State Department Deputy Legal Adviser noting that the United States regards the Vienna Convention to be "entirely self-executing").

> The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that *the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.*

Emphasis added.

No signatory country can so burden the exercise of the arrestee's right to be informed of his rights that the "purposes" of the right are compromised or lost. Significantly, during the drafting of Article 36(2), the Soviet Union offered an amendment which would have permitted domestic law to impair the rights accorded in Article 36(1) so long as they did not render them nugatory. In support of the USSR's proposed amendment, Mr. Khlestov stated that, as drafted (and ultimately adopted), Article 36(1) could "force states . . .to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedures in order to protect alien offenders" U.N. GAOR, Conference on Consular Relations, 12th plen. mtg., agenda item 10, ¶¶2-9, U.N. Doc. A/CONF. 25/SR.12, 17 April 1963, at 1, *represented in* 1 Off. Rec. 40; *see* id. The foregoing analysis by the U.S.S.R. spokesman was correct. That was the whole idea.

The doctrine of procedural default was articulated by this Court in Coleman v. Thompson, 501 U.S. 722, 750 (1991), as applying to "all cases in which a prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule."[12] The doctrine is designed, among other things, to promote comity between the states and the federal courts. Petitioner does not contend that rights granted by treaty can never be defaulted. He does contend,

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[12]The Vienna Convention claim is considered simultaneously exhausted and defaulted under this Court's rule in Teague v. Lane, 489 U.S. 288 (1989), because state law prohibits Mr. Breard from returning to state court to present the claim. *See* Va. Code Ann. § 8.01-654.1.

however, that the specific language of Article 36(2) precludes such default of Article 36(1) rights *in these circumstances*. Application of the procedural default doctrine to postconviction claims under Article 36(1) would result in a failure to enable "full effect" to be given to the rights there granted, where, as here, the petitioner was ignorant of his rights (of which the state had the unequivocal duty to inform him) during the entire time he was litigating in the state judicial system.

If the courts disregard Virginia's "defiant and continuing disregard for the Vienna Convention," the federal judiciary will strip away the fundamental protections provided by the Vienna Convention in this country. The effect would be to invite similar behavior by other signatories. *See* Butzner, J., concurring below. The United States' interest in protecting these rights was brought home by the lawlessness and barbarism of those who overran the American Embassy in Tehran, Iran in 1979. Taking 52 American diplomats and civilians hostage, Iran deprived them of all access to the outside world for 444 days. The United States reacted with outrage and pressed its case before the International Court of Justice, where it proclaimed to the world that "the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations." Memorial of the United States to the International Court of Justice in the Case Concerning United States Diplomatic and Consular Staff in Tehran filed in response to the 1979 storming of the American Embassy.

In an earlier incident, the United States protested Syria's 1975 arrest of two American citizens and its failure to notify the American Embassy. Ronan Doherty, Foreign Affairs v. Federalism, 82 Va. L. Rev., 1281, 1318 n.165 (1996), citing Luke T. Lee, Consular Law and Practice 145 (2d ed. 1991). In a telegram to the Syrian authorities, the United States felt it necessary to

remind them that the Vienna Convention was a solemn treaty obligation, and stated that "[t]he Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to those nationals." Id., quoting Department of State Telegram 40298 to Embassy Damascus, Feb. 21, 1975. As matters have developed, however, any such Syrian confidence would have been misplaced.

Notwithstanding the great weight attached by the federal government to the Vienna Convention and to the personal rights guaranteed by its provisions, the individual states have long ignored legal obligations imposed upon them by the Convention. Indeed, the District Court expressly found in Mr. Breard's case that Virginia has engaged in a "persistent refusal to abide by the Vienna Convention." Breard v. Netherland, 949 F. Supp. 1255 1263 (E.D. Va. 1996).[13] App. 23.

The broad national interest of protecting Americans abroad and the protection of individual rights necessary to a fair trial suggest that this Court should grant certiorari in this case to determine whether the Convention's Article 36 can be rendered meaningless by application of the domestic doctrine of procedural default. As this Court has previously stated, "Experience has shown that

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[13]In Murphy v. Netherland, C.A. No. 3:95CV856, slip op. (E.D. Va. July 26, 1996), in which a Mexican national raised claims under the Vienna Convention, the same District Court Judge found that Virginia has demonstrated a "defiant and continuing disregard for the Vienna Convention." Id. at 7. App. 44. Moreover, as noted above, while considering Mr. Murphy's then-pending clemency petition, the then-Governor of Virginia is said to have "disputed whether it was Virginia's responsibility to notify Murphy of his Vienna Convention right." App. 293-95. This sort of misconception at the highest level of state government must be remedied, and can be remedied only if this Court takes action to make clear to the states that it is imperative for state officials to understand and abide by the obligations imposed by the Vienna Convention.

In that same news article, the Legal Adviser to the State Department is quoted as saying that the State Department would "convey to the Embassy of Mexico on behalf of the government of the United States, our deepest regrets over the apparent failure to provide Mr. Murphy with consular notification." Such offers to make post-execution expressions of regret cannot be the hallmark of American justice, particularly when the ultimate event requiring that regrets be tendered had not yet occurred and was made inevitable only by the inaction of the United States.

international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." Hines v. Davidowitz, 312 U.S. at 64.

II. The Writ Should Be Granted to Determine Whether Novelty of the Law Provides Cause for the Default of a Post-conviction Claim, and Whether the Criminal Defense Bar's Virtually Universal Ignorance of the Vienna Convention and the State's Withholding of Information Excuse the Default of a Claim Brought under Article 36(1)

If Vienna Convention claims are subject to procedural default, the Court should decide whether that default must be excused in this case because Mr. Breard's counsel, like nearly every other criminal defense lawyer in the country, did not know about the consular notification provision in the treaty and would not have discovered it in the course of reasonable and diligent investigation. As this Court made clear in Reed v. Ross, 468 U.S. 1 (1984), an attorney's failure to assert a claim based upon federal law, so novel that its legal basis was not reasonably available, cannot be the basis of a procedural default. Breard has consistently asserted that the novelty of Vienna Convention claims prior to 1996 constitutes cause to excuse any procedural default. *See* id. at 16.

Proof of "cause" typically requires something external to the petitioner which is not attributable to him. Coleman v. Thompson, 501 U.S. 722, 753 (1991). Although known in certain diplomatic and immigration law circles, the consular notification provisions of the Vienna Convention were not discussed in any published criminal law or habeas case outside of the deportation context until April 1996, two years after Mr. Breard had completed his direct appeal and

three months after the conclusion of state postconviction proceedings.[14] The only published court decisions concerning these rights before 1996 arose in the context of immigration and deportation proceedings.[15] The Convention is not published in the United States Code. It is not published in the Virginia Code. The consular notification rights conferred by Article 36 are not listed in the relevant criminal law subject-matter indices of United States Treaties and are not referenced in any American criminal law treatise or habeas corpus treatise. In sum, there is simply no reason to believe, as the Court of Appeals suggested, Breard v. Pruett, No. 96-25, slip op. at 6-7 (4th Cir. Jan. 22, 1998), App. 6-7, that any reasonably competent practicing criminal lawyer would have or should have known of the Convention before the publication in 1996 of the Fifth Circuit's opinion in Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996).[16]

The states, however, did know about the protections offered by the Vienna Convention. As noted above, the U.S. Department of State regularly sends notices to every state's governor, attorney

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[14]One unpublished habeas opinion available on Lexis mentioned a refusal to permit consular access under the Convention, Mami v. Van Zandt, No. 89 Civ. 0554, 1989 U.S. Dist. Lexis 5002 (S.D.N.Y. May 9, 1989), but, as an unpublished opinion, it was not readily available to practitioners, and, in any event, it did not relate to the notification requirements of the Convention. It was not until April 1996 that a published opinion provided generally available notice of the existence of rights under the Vienna Convention that might be applicable to criminal law proceedings other than deportation proceedings. Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996). The criminal law and habeas treatises in this field do not mention the treaty and are of no help. *See, e.g.*, John L. Costello, Virginia Criminal Law and Procedure (Michie Co. 1991, 1993 Cum. Supp. and 1994 Cum. Supp.); James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure (2d ed. Michie Co. 1994).

[15]United States v. Vega-Mejia, 611 F.2d 751 (9th Cir. 1979) does not mention the treaty. Waldron v. I.N.S., 17 F.3d 511 (2d Cir. 1993), *cert. denied*, 513 U.S. 572 (1994), United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980), and United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979), which discuss the treaty, do not have any criminal law head notes. As noted above, Mami v. Van Zandt, No. 89 Civ. 0554, 1989 U.S. Dist. Lexis 5002 (S.D.N.Y. May 9, 1989), a habeas corpus case, was not reported in official reports and was not readily available.

[16]Faulder's attorney, Sandra Babcock, submitted an affidavit which was filed in the Court of Appeals in Murphy v. Netherland, C.A. No. 3:95CV856, slip op. (E.D. Va. July 26, 1996), in which she states that she did extensive research in connection with Mr. Faulder's case but learned of the Vienna Convention "purely by chance" only when a Canadian consular official, unsolicited, told her about it. App. 282-84.

general, and to mayors of cities of over 100,000, reminding them of their legal obligations under the Vienna Convention. Of particular import with respect to Mr. Breard's September 1992 arrest, the State Department sent out such notices in August 1991 and October 1992. App. 238-73.

Where the prosecutors had the necessary information but ignored their legal duty to convey it to its intended recipients, and where there is no objective reason to expect any reasonably competent defense attorney to have such knowledge, cause has been established. *See* Coleman v. Thompson, 501 U.S. 722, 753 (1991) (interference by officials making "compliance impracticable, would constitute cause" for procedural default); Amadeo v. Zant, 486 U.S. 214, 221, 222-24, 228-29 (1988) (where document was discovered by mere fortuity after it had been effectively "concealed" in state public records, cause existed to override procedural default of claim). To do otherwise not only condemns foreign nationals for an ignorance that no reasonable person could expect them to have overcome, but rewards the states for their wilful violation of federal law.

While Mr. Breard does not concede that he must show prejudice with respect to a Vienna Convention violation because it is a structural error, he has nonetheless made an affirmative showing of prejudice. He was offered a life sentence in exchange for a guilty plea, and he rejected the bargain because of his culturally based belief that the jurors would acquit him once they understood that he had been under a satanic curse that had been lifted when he found Christ. It is no answer that Mr. Breard had court-appointed American trial counsel to advise him. He needed the cultural bridge of a consul who had an understanding of both the North American and South American cultures and legal systems.

If procedural default may apply to the treaty, Mr. Breard suggests that this Court should grant certiorari to evaluate the applicability of the default doctrine where a state has violated its federally-

created duty to disclose information critical to a defendant's fair trial when only the state knew of the information.

III. The Writ Should Be Granted to Set Threshold Standards under the Due Process Clause for the Review that Most State Appellate Courts Perform When They Consider Whether a Sentence of Death is Excessive or Disproportionate

A. Virginia Created a Life and Liberty Interest by Enacting Its Proportionality Review Statute

Virginia, like many states, adopted a statutory procedure for the review of death penalty cases similar to the procedures reviewed and upheld in Gregg v. Georgia, 428 U.S. 153 (1976). Under Virginia's procedure, the Supreme Court of Virginia is required to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Va. Code Ann. § 17-110.1(C)(2). With respect to the required proportionality review, the statute provides:

> The Supreme Court may accumulate the records of all capital felony cases for such period of time as the Court may determine. The Court *shall consider such records as are available* as a guide in determining whether the sentence imposed in the case under review is excessive.

Va. Code Ann. § 17-110.1(E) (emphasis added).

Thus, the Virginia legislature has vested in those sentenced to death a right to a proportionality review in the Virginia Supreme Court which compares the sentence in question to those imposed in similar cases. This right constitutes a life and liberty interest in the prescribed procedure to assure that the state properly distinguishes between those for whom the death penalty is appropriate and those for whom it is not. *Cf.* Spaziano v. Florida, 468 U.S. 447, 460 (1984)(this

Court has adopted certain guidelines designed to compel a state to "administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"). To survive constitutional scrutiny, the state must have a "way" or system or method that meets "goals of measured, consistent application and fairness to the accused." Eddings v. Oklahoma, 455 U.S. 104, 111 (1982). The Virginia defendant sentenced to death has a state-created expectancy that the Supreme Court of Virginia will compare his case to all similar cases in Virginia to assure that his sentence is not disproportionate.

B. The Virginia Supreme Court's Procedures Do Not Comply with the Life and Liberty Interests Accorded Petitioner by the Requirements of Virginia's Proportionality Review Statute.

The Supreme Court of Virginia devoted but one paragraph to its proportionality review of Mr. Breard's death sentence. The Court initially correctly stated the test:

> The test we must apply in conducting the proportionality review is "whether *other sentencing bodies in this jurisdiction* generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant."

Breard v. Commonwealth, 445 S.E.2d 670, 682 (Va.1994), *cert. denied*, 513 U.S. 971 (1994) (citing Jenkins v. Commonwealth, 244 Va. 445, 462, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036 (1993)) (emphasis added). In the next sentence, the Court wrote:

> To guide us in applying the test, we have compiled and examined the records of all capital murder cases *reviewed by this Court*, including those in which a life sentence was imposed.

Id. at 682 (emphasis added). The denial of due process occurs because the set of "cases reviewed by this Court," that is those previously appealed to that court, does not equal the set of "capital murder cases decided by other sentencing bodies." The Virginia Supreme Court omits from its

review those cases not appealed to the court. Death cases are appealed directly to the Supreme Court, bypassing the intermediate state Court of Appeals. Life sentence cases, if appealed at all, go instead to the Court of Appeals with a follow up appeal to the Supreme Court by petition. Va. Code Ann. §§ 17-110.1(A); 17-116.05:1(A)(i); 17-116.08.

According to statistics in the Presentence Investigation Database maintained by the Virginia Criminal Sentencing Commission, an agency of the Commonwealth of Virginia (the "VCSC Database"), between January 1, 1985 and December 31, 1995, forty-three persons were charged with capital murder under § 18.2-31(5) of the Code of Virginia (murder in the commission of, or subsequent to, rape, sodomy, etc.) and convicted of some crime. Thirty-three of those individuals were convicted of capital murder in violation of § 18.2-31(5). Of the thirty-three convicted of capital murder, nineteen individuals (58%) were given a sentence other than death and fourteen individuals (42%) were given the death penalty. App. 136-37. Of the life sentence cases, only two were ultimately appealed to the Virginia Supreme Court.[17] Thus, the Supreme Court's pool of "similar" cases excludes the majority of all such convictions for the eleven year period -- seventeen out of thirty-three (51%) -- and, more to the point, excludes the vast majority of convictions in which a life sentence was imposed -- seventeen out of nineteen (89%). App. 304-05.

[17]The cases available for review by the Supreme Court of Virginia are listed in a compilation prepared by that court and a copy was included with Breard's petition as Exhibit 33. It lists two capital murder-rape cases in which life sentences were given during the 1985-1995 period; but only two, in stark contrast to the nineteen reported by the VCSC Database.

C. The Virginia Supreme Court's Review of Petitioner's Case Denied Petitioner Due Process of Law.

Mr. Breard had a state-created right to a proportionality review that conformed to the dictates of the Virginia Code which requires the state supreme court to determine whether the sentence of death is "excessive or disproportionate to the penalty imposed *in similar cases*, considering both the crime and the defendant." Va. Code Ann. § 17-110.1(C)(2) (emphasis added). By limiting the pool to cases previously appealed to the Supreme Court, that court so skewed the pool that the required review was of no effect. While a proportionality review is not constitutionally required, Pulley v. Harris, 465 U.S. 37, 43 (1984), it is clear that federal procedural due process claims may be based on rights created by state statute. Evitts v. Lucey, 469 U.S. 387 (1985); Wolff v. McDonnell, 418 U.S. 539, 556-58 (1974); *accord* Harris v. Blodgett, 853 F. Supp. 1239, 1286 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995). The deprivation of Mr. Breard's right to a proportionality review conforming to the provisions of the state statute constitutes a cognizable due process claim because the statute created a protected life and liberty interest.

The District Court below determined that this claim that the Supreme Court's process denied petitioner his life and liberty interest without due process was not procedurally defaulted, but it

rejected the claim on its merits.[18] The Fourth Circuit, without comment, declined to review this claim, even when Mr. Breard repeated his complaint on a motion for rehearing. App. 80.

The effect of skewing the pool of cases to be reviewed is apparent. The Virginia Supreme Court, in twenty years of practice under the present death penalty statute, *has never reversed a death sentence because it was disproportionate*. The Virginia Supreme Court's procedures lead inexorably to this result.

An examination of cases in which a defendant was charged with capital murder under § 18.2-31(5) and convicted of a crime during the period 1985-1996 provides a glimpse at the universe of cases that should be considered by the Virginia Supreme Court in its proportionality reviews. A description of most of these cases in the VCSC Database was included in Mr. Breard's Petition, App.

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[18]In its opinion, the District Court quoted from Breard's Brief on direct appeal in the Virginia Supreme Court to demonstrate the correctness of its holding that this claim had not been defaulted under the rule of Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975). Breard also preserved the claim by presenting it to the Virginia Supreme Court on habeas review. App. 82-89.

In considering the merits, the trial court relied upon Peterson v. Murray, 904 F.2d 882 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990). Peterson, however, is distinguishable. There, the petitioner argued that the Virginia Supreme Court considered only cases in which the death penalty had been imposed and not any life sentence cases. The Virginia court had previously rejected that argument stating "we have examined the records in all capital-murder cases reviewed by this Court . . ." and the Fourth Circuit accepted that statement. Breard's claim is different as set forth in Section III.B., *supra*.

The Peterson court also stated that a federal court may not issue a writ of habeas corpus on the ground that the Virginia Supreme Court had made an error of state law, citing Shaw v. Martin, 733 F.2d 304, 317 (4th Cir.), *cert. denied*, 469 U.S. 873 (1984). Shaw, in turn, rejected a proportionality review claim citing Pulley v. Harris, 465 U.S. 37 (1984). The relevant portion of the Pulley v. Harris case, however, simply holds that the failure of California to require a "comparative proportionality review" cannot be successfully challenged under Furman v. Georgia, 408 U.S. 238 (1972). Furman, of course, concerned the Eighth Amendment's prohibition on cruel and unusual punishment. Breard does not base his proportionality review claim upon a violation of the Eighth Amendment; rather, he asserts that, once Virginia mandated a specific kind of proportionality review and thereby created a life and liberty interest, it could not fail to provide that specific review. *See* Harris v. Blodgett, 853 F. Supp. 1239, 1286 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995); *see also* Evitts v. Lucey, 469 U.S. 387 (1985); Hicks v. Oklahoma 447 U.S. 343 (1980).

Charts, App. 304-09.[19] Such an examination will also demonstrate that Virginia has not rationally distinguished between those for whom death is an appropriate sanction and those for whom it is not.

The charts of cases demonstrate that, in Virginia, the judge or jury does not "generally" impose the death penalty for a certain type of crime or criminal defendant. *Cf.* Jenkins v. Commonwealth, 244 Va. 445, 462, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036 (1993) ("On the question of disproportionality and excessiveness, we determine whether *other sentencing bodies in this jurisdiction generally impose* the supreme penalty for comparable or similar crimes, considering both the crime and the defendant") (emphasis added). Without minimizing the seriousness of Mr. Breard's crime, it is clear that many cases involving facts more vile than those in this case and defendants more dangerous than Mr. Breard have resulted in life sentences.

At this time, more than half of the states in the United States have proportionality review statutes or procedures that require an inquiry like that required in Virginia. *See* State v. Cobb, 234 Conn. 735, 754 n.18, 663 A.2d 948, 958 n.18 (1995) (cataloging state practices). The procedures under those statutes vary, as they might among the states, but numerous courts have struggled to determine how to perform the required review in a manner consistent with the requirements of the federal constitution. *See, e.g.*, State v. Bland, 958 S.W. 2d 651 (Tenn. 1997) (citing cases), *petition for cert. filed* (U.S. Feb. 23, 1998)(No. 97-8033); Cobb, *supra*; State v. Marshall, 130 N.J. 109, 125-140, 613 A.2d 1059, 1067-74 (1992), *cert. denied*, 507 U.S. 929 (1993); Banks v. Horn, 939 F. Supp. 1165, 1175 (M.D. Pa. 1996), *judgment vacated and remanded*, 126 F.3d 206 (3d Cir. 1997); Harris v. Blodgett, 853 F. Supp. at 1286-91. This case gives this Court an opportunity to provide

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[19]The descriptions were obtained from newspaper articles and, without access to discovery, counsel for petitioner were unable to identify several cases.

guidance concerning the extent to which the Due Process Clause requires compliance with such statutes.

CONCLUSION

Over 200 years ago, James Madison spoke for the American people when he wrote, "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit." The Federalist, No. 51 at 241 (Masters, Smith & Co. ed. 1852). For foreign nationals such as Breard, justice demands a fair trial with the assistance of his consul and a fair appeal. Virginia and other states have engaged in a long-term pattern of misconduct that has resulted in the denial of the Vienna Convention rights of numerous foreigners, to their severe detriment. As Judge Butzner observed below, if other nations follow the example of American states, the freedom and safety of Americans traveling abroad will be seriously threatened. Moreover, Virginia did not provide Mr. Breard with due process under its own statutory procedures governing appellate judicial proceedings in death penalty cases.

This Court should grant certiorari in this case and determine whether the states may be permitted to engage in the wholesale disregard of duties imposed by treaties entered into by the United States and, if not, how such violations are to be remedied. At the very least, a petitioner such as Breard should not be put to death where, but for Virginia's flagrant violation of his rights, he would have escaped that ultimate penalty. The Court should also grant certiorari to determine the due process ramifications of Virginia's disregard of the state-created life and liberty interests in the statutory mandates of its capital punishment procedure. With respect to the latter issue, Petitioner

submits that this Court should await its own decision on a related issue in Woodard v. Ohio Adult Parole Auth., __U.S.__, 118 S. Ct. 333 (1997), before deciding the due process question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for a Writ of Certiorari was hand delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, this 11th day of March, 1998.